

TIONG KHENG HOLDINGS SDN BHD**A****v.****IKHTISAS SEMPURNA SDN BHD****HIGH COURT SABAH & SARAWAK, KOTA KINABALU****B****ABDUL RAHMAN SEBLI JC****[ORIGINATING SUMMONS NO: T24-26-2009]****14 JULY 2009**

LAND LAW: *Easement - Right of way - Stay of execution of order of Assistant Collector of Land Revenue granting defendant right of way over plaintiff's land - Whether order outside scope of s. 31(1)(d) Land Ordinance (Cap. 68) (Sabah) - Urgent necessity or grave situation - Whether order erroneous*

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LAND LAW: *Easement - Right of way - Prohibitory injunction restraining defendant from executing order of Assistant Collector of Land Revenue granting defendant right of way over plaintiff's land - Principles applicable - Pending appeal - Damages - Balance of convenience - Serious issues to be tried*

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CIVIL PROCEDURE: *Execution - Stay - Order of Assistant Collector of Land Revenue granting defendant right of way over plaintiff's land - Whether order outside scope of s. 31(1)(d) Land Ordinance (Cap. 68) (Sabah) - Urgent necessity or grave situation - Whether order erroneous*

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CIVIL PROCEDURE: *Judgments and orders - Stay of execution - Order of Assistant Collector of Land Revenue granting defendant right of way over plaintiff's land - Whether order outside scope of s. 31(1)(d) Land Ordinance (Cap. 68) (Sabah) - Urgent necessity or grave situation - Whether order erroneous*

F**G**

CIVIL PROCEDURE: *Injunction - Prohibitory injunction - Injunction to restrain defendant from executing order of Assistant Collector of Land Revenue granting defendant right of way over plaintiff's land - Principles applicable - Pending appeal - Damages - Balance of convenience - Serious issues to be tried*

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CIVIL PROCEDURE: *Jurisdiction - Inherent jurisdiction of court - Prohibitory injunction restraining defendant from executing order of Assistant Collector of Land Revenue granting defendant right of way over plaintiff's land - Pending appeal to Director of Land and Survey under Land Ordinance (Cap. 68) (Sabah)*

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- A By originating summons, the plaintiff applied for, *inter alia*, a stay of execution of an order made by the Assistant Collector of Land Revenue, Lahad Datu ('ACLR') under s. 31(1)(d) of the Land Ordinance (Cap. 68) (Sabah) ('Ordinance') granting the defendant a right of way over the plaintiff's land, until further directions of the court, and further or in the alternative, a prohibitory injunction
- B restraining the defendant from executing the ACLR's order until further directions of the court. The plaintiff also lodged an appeal to the Director of Land and Survey, Lahad Datu ('Director') against the ACLR's order pursuant to s. 41 of the Ordinance, which appeal was still pending. The plaintiff contended that the
- C defendant's application for right of way was motivated by convenience rather than by necessity because there was an existing alternative road through which the defendant could get across to its related company's land without passing through the plaintiff's land. The plaintiff further averred that as a matter of fact the defendant did not fulfil the requirements of s. 31(1)(d) of the Ordinance in that the purpose for which it applied for the right of way was not to get across to the nearest public road but to get to its related company's land.
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- E **Held (allowing the plaintiff's application in terms of prayers (2) and (3) of originating summons):**
- (1) The right of way granted by the ACLR was not for a right to
- F "the nearest public road or a river or foreshore". In fact, the defendant candidly admitted that the purpose of the application was to connect its land with the land owned by its associate company, Syarikat Pompous Sdn Bhd. Thus the order granted by the ACLR, based as it was on this ground, appeared to be outside the scope of s. 31(1)(d) of the
- G Ordinance. (para 10)
- (2) The purpose behind the power to grant a right of way is to resolve an urgent necessity or a grave situation, which was not the situation that the defendant in the present case faced. *Si*
- H *Rusa Inn Sdn Bhd v. The Collector of Land Revenue, Port Dickson* (foll). (paras 11 & 12)
- (3) On the face of it the ACLR's order was erroneous. Furthermore, the right of way granted would have the effect of cutting through the middle of the plaintiff's land and
- I dividing it into two halves. The High Court in *Thankam De*

Silva lwn. Pentadbir Tanah, Daerah Larut dan Matang, Taiping considered this to be a valid reason to reject an application for right of way. *Thankam De Silva lwn. Pentadbir Tanah, Daerah Larut dan Matang, Taiping* (foll). (para 13) A

(4) In *Subashini Rajasingam v. Saravanan Thangathoray* (No. 2), the Court of Appeal held that the court has inherent jurisdiction to grant an injunction against the successful party pending the disposal of the appeal. That principle applied to a pending appeal to the Director under the Ordinance. *Subashini Rajasingam v. Saravanan Thangathoray* (No. 2) (foll). (para 14) B
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(5) The plaintiff had an inviolable right to his land. If the injunction were to be granted, there was an alternative route for the defendant to get to the other piece of land. In any event, the defendant could always be compensated with damages for the inconvenience and additional costs of using this alternative road. (para 15) D

(6) There was no compelling evidence to support the defendant's claim that the alternative road was geographically unsuitable and dangerous. The situation did not partake of gravity or cogent necessity. There would, therefore, be no harm if the defendant continued to use the alternative route pending the disposal of the appeal. (para 16) E

(7) Having regard to the facts and circumstances of this case, the balance of convenience lay in favour of preserving the *status quo*. There were serious issues that needed to be addressed in the pending appeal before the Director. (para 17) F

Case(s) referred to:

Si Rusa Inn Sdn Bhd & Ors v. The Collector of Land Revenue, Port Dickson & Ors [1986] 1 CLJ 584; [1986] CLJ (Rep) 673 HC (foll) G

Subashini Rajasingam v. Saravanan Thangathoray (No 2) [2007] 3 CLJ 209 CA (foll)

Thankam De Silva lwn. Pentadbir Tanah, Daerah Larut dan Matang, Taiping [1995] 4 CLJ 584 HC (foll) H

Legislation referred to:

Land Ordinance (Chap 68) (Sabah), ss. 31(1)(d), 32(1)(d), 41

For the plaintiff - Ain Hj Karama (Chen Kok On with her); M/s Peter Lo & Co I

For the defendant - Fiona Jinu; M/s Francis Chia & Jinu

Reported by Suresh Nathan

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JUDGMENT

Abdul Rahman Sebli JC:

[1] By originating summons dated 8 May 2009 the plaintiff applied for, *inter alia*, the following reliefs:

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(1) an order for stay of execution of the order granting right of way to the defendant dated made by the Assistant Collector of Land Revenue, Lahad Datu (the ACLR) until further directions of the court;

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(2) further or in the alternative, a prohibitory injunction restraining the defendant from executing the order until further directions of the court.

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[2] The undisputed facts are as follows. The plaintiff is the registered owner of two pieces of land which are planted with oil palm trees. The defendant filed an application for a right of way from its land to a piece of land belonging to its related company over the plaintiff's land. The application was allowed by the ACLR by an order dated 31 March 2009. The right of way granted to the defendant was 16 feet in width and for a distance of 3.8 kilometers. The ACLR also made an order that the plaintiff shall not be entitled to any compensation for the right of way.

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[3] Armed with the ACLR's Order the defendant proceeded to exercise the right of way despite resistance by the plaintiff. The plaintiff contends that the defendant has no immediate right of way because there are procedures under the Sabah Land Ordinance (the Land Ordinance) and the Land Rules which the defendant must but has not fulfilled before exercising such right.

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[4] According to the plaintiff what the defendant had done was to literally bulldoze their way through the plaintiff's land. For that reason the plaintiff says the defendant should be prohibited from continuing with its unlawful and unreasonable conduct.

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[5] The ACLR's Order was granted under s. 31(1)(d) of the Land Ordinance which provides:

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(1) Every title shall, by virtue of this Ordinance, be subject, in the absence of an express provision to the contrary, to the following implied conditions in respect of the land contained therein:

(d) any owner of alienated land, whether his title be of a date prior or subsequent to the commencement of this Ordinance, may apply to the Collector of the district in which his land is situate for a right of way from his land over any other alienated land to the nearest public road or a river or foreshore, or for permission to construct a drain or irrigation channel across such land, and the Collector shall deal with the application in the manner prescribed;

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[6] The plaintiff has lodged an appeal to the Director of Land and Survey Lahad Datu (the Director) against the ACLR's Order pursuant to s. 41 of the Land Ordinance on 29 April 2009. The appeal is pending.

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[7] In the meantime by letter dated 28 April 2009 the plaintiff requested the ACLR and the Director to stay the ACLR's Order but received no reply. Hence this application.

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[8] It is the plaintiff's contention that the defendant's application for right of way was motivated by convenience rather than by necessity because there is an existing alternative reserved road through which the defendant could get across to its related company's land without passing through the plaintiff's land.

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[9] It was further contended that as a matter of fact the defendant did not fulfill the requirements of s. 31(1)(d) of the Land Ordinance in that the purpose for which it applied for the right of way was not to get access to the nearest public road but to get to its related company's land. In other words it was unrelated to the purpose intended by s. 31(1)(d) of the Land Ordinance.

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[10] I agree with the plaintiff because the right of way granted by the ACLR was not for a right to "the nearest public road or a river or foreshore". In fact the defendant candidly admitted that the purpose of the application was to connect its land with the land owned by its associate company, Syarikat Pompous Sdn Bhd. Thus the order granted by the ACLR, based as it was on this ground, appears to be outside the scope of s. 31(1)(d) of the Land Ordinance.

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[11] In *Si Rusa Inn Sdn Bhd & Ors v. The Collector of Land Revenue, Port Dickson & Ors* [1986] 1 CLJ 584; [1986] CLJ (Rep) 673 Peh Swee Chin J said in relation to the facts of that case:

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- A The undisputed purpose for the Grantee's application was one of pleasure, pure and simple. He wanted a shorter, or much shorter route to the sea for swimming and allied activities, the Grantee's own land being a second-layer land sandwiched between the 1st appellant's land (with its frontage to the sea shore) and a public road or highway. It has never been doubted that there has been
- B an alternative route at all material times, to the sea shore *via* the public road available to the Grantee, but the distance to be covered would be between one to two kilometers instead of the comparatively short route through the 1st appellant's land.
- C [12] The court further held that the purpose behind the power to grant a right of way is to resolve an urgent necessity or a grave situation. The defendant in the present case is not faced with such situation.
- D [13] On the face of it the ACLR's Order granting the defendant a right of way over the plaintiff's land is erroneous. Furthermore, the right of way granted would have the effect of cutting through the plaintiff's land through the middle and into two halves. This has been considered by the High Court in *Thankam De Silva lwn. Pentadbir Tanah, Daerah Larut dan Matang, Taiping* [1995] 4 CLJ
- E 584 to be a valid reason to reject an application for right of way.
- F [14] In *Subashini Rajasingam v. Saravanan Thangathoray (No. 2)* [2007] 3 CLJ 209 it was held by the Court of Appeal that the court has inherent jurisdiction to grant an injunction against the successful party pending the disposal of the appeal. In my view the principle applies to a pending appeal to the Director under the Land Ordinance.
- G [15] Does the balance of convenience lie in favour of granting the injunction? To begin with the plaintiff has an inviolable right to his land: see *Si Rusa Inn Sdn Bhd, supra*. Will it be the end of the road for the defendant if the injunction is granted? I do not think so because there is an alternative route for the defendant to get to the other piece of land. In any event the defendant can always
- H be compensated with damages for its inconvenience and additional costs for using this alternative road.
- I [16] I can find no compelling evidence to support the defendant's claim that this alternative road is geographically unsuitable and dangerous. In my view the situation in the present case does not partake of gravity or cogent necessity. There will therefore be no harm if the defendant continues to use the alternative route pending the disposal of the appeal.

[17] Having regard to the facts and circumstances of the case the balance of convenience lies in favour of preserving the *status quo*. To my mind there are serious issues that need to be addressed in the pending appeal before the Director.

[18] For reasons aforesaid the plaintiff's application ought to be allowed in terms of prayers 2 and 3 of the originating summons dated 8 May 2009.

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